United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,858

HUNTINGTON T. BLOCK,

Appellant,

v.

THE McLAUGHLIN COMPANY,

Appellee.

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Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Paulson
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STATEMENT OF QUESTIONS PRESENTED

1. One question is, whether an agreement which is signed by a group of business associates, which contains no recitation of consideration, and which is only a statement of future policy or intention, is valid and legally enforceable.

2. A second question is, whether an agreement signed by business associates, which contains a provision for the sale of certain corporate stock, can be specifically enforced by the corporation when said corporation is not a party to the agreement.

3. A third question is, whether an agreement which is so inarticulately drawn as to be uncertain in setting forth the rights and liabilities of the parties, is the proper basis for an Order granting specific performance.

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TREATISES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,858

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Appeal from the United States District Court
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The Appellee, the Plaintiff below, is a Maryland corporation, doing business in the District of Columbia, and filed an action for specific performance against the Appellant, a resident of the District of Columbia (JA 1-3).

This is an appeal from a Judgment for Specific Performance entered on the 27th day of April, 1964 ordering Appellant to transfer and deliver 110 shares of stock to the Appellee (JA 17).

The District Court had jurisdiction under the provisions of Title 11, Section 306, of the District of Columbia Code, 1961 Edition, and this Court has jurisdiction under the provisions of Title 28, Section 1291 of the United States Code, 1958 Edition.

STATEMENT OF THE CASE

This is an action to require appellant, Huntington T. Block, to forfeit 110 shares of the capital stock of appellee corporation, The McLaughlin Company, for its par value. This stock has a par value of $10.00 per share (JA 2), is admittedly worth several times that amount (JA 13), and cost the appellant approximately $25.00 per share (JA 13).

Appellant is asked to forfeit this stock because he signed an agreement dated November 16, 1955. This agreement was signed by nine insurance salesmen or solicitors, who are called associates of the appellee. Two additional individuals signed the agreement, one on June 30, 1959 and the second on March 17, 1960 (JA 9); presumably these two individuals became associates of appellee on or about said dates. The original agreement was to continue until October 31, 1956; a statement signed by five of the original parties stated that said agreement was to continue until December 31, 1957 (JA 9); and a final statement dated November 8, 1957 was signed by all parties and extended said agreement "until such time as terminated by mutual consent" (JA 10). The lower court held that even though appellee was not a party to the agreement, specific performance could be granted by applying the doctrine of the third party beneficiary (JA 14).

The Appellee is a Maryland Corporation doing business in the District of Columbia as an insurance general agency (JA 1) and has a number of associates soliciting the sale of insurance as independent

contractors (JA 12). Said associates own their own business, are responsible for the collection of the premiums for their business and derive their income from commissions on their business (JA 12). Appellee provides the associates with offices and maintains all files and records, receiving therefor a part of the commission.

Appellant became associated with the appellee in 1948 and worked continuously as a soliciting associate until March 5, 1962. In 1955 the associates signed the aforementioned agreement. This agreement was inarticulately drawn (JA 12) and purported to provide for the transfer of business and payments to a designated beneficiary in the event of an associate's death. However, page two of the Agreement (JA 8) contained the following paragraph, to wit:

> "It is further agreed that the business of each living associate is legally his own business; however, should the associate leave the organization, he shall forfeit his stock interest to the company, receiving payment for the same at par value for each share, less any legitimate indebtedness the associate may have with the company. Should an associate be requested to resign, which resignation could be brought about by the vote of a majority stock ownership, his stock interest must be relinquished to the company, payment for same to be made on the basis of the amount the associate paid for such stock. This payment shall also be paid, less any legitimate indebtedness the associate may owe to the company."

It is the foregoing paragraph which forms the basis of the present suit.

The facts surrounding appellant's departure from the appellee are clearly stated in a quotation from the lower court's oral opinion (JA 13-14), to wit:

> "There came a time when the defendant apparently desired to go into business by himself. He made arrangements to do so and leased office space for that purpose. Having completed his arrangements

> he then on March 1st, 1962 came in and announced to Mr. McLaughlin his resignation. This apparently took Mr. McLaughlin by surprise as evidently he had valued Mr. Brock's affiliation with the company and regretted to see him leave. The discussion evidently developed into a clash of tempers. On the 5th of March a meeting between Mr. McLaughlin and the defendant and several associates was had for the purpose of discussing the method of terminating the defendant's connection with the organization. The defendant's resignation as originally tendered was to take effect on the 31st of March. Unfortunately, the meeting broke up in another clash of tempers and the defendant was asked to leave the organization at that time, to take his belongings and to leave the keys."

After appellant's dismissal from the organization, he attempted to continue his insurance business at his own office, but with considerable difficulty as his records were withheld by appellee. As the 110 shares of stock owned by appellant were worth over $3,000.00, appellee eagerly tendered $1,100.00 to the appellant (JA 5). Appellant refused to accept the tender and turn over his shares because appellee was not a party to any written agreement with appellant and because appellee refused to give appellant his business (JA 6).

Approximately six months thereafter, this action was filed and, on the date of trial, appellant still had not received all of his business and the records pertaining thereto (JA 15).

STATEMENT OF POINTS

The points relied on by the appellant in this appeal are as follows:

1. The Court erred in granting specific performance under an agreement which lacked mutuality of obligation.

2. The Court erred in applying the doctrine of the third party beneficiary in a suit for specific performance.

3. The Court erred in granting specific performance under a vague and uncertain agreement.

4. The Court erred in ruling that Appellant left the organization in such a manner as to forfeit his stock.

5. It was an abuse of the Court's discretion to grant specific performance when Appellant had not received his business as required by the agreement.

SUMMARY OF ARGUMENT

1. The agreement which forms the basis of this action for specific performance is void because it is totally lacking in consideration and mutuality of obligation.

2. Since the agreement is inarticulately drawn and does not set forth the rights and duties of the parties with clarity, it cannot be specifically enforced.

3. The lower Court held that mutuality of obligation or remedy was not necessary in order to specifically enforce a contract. This is contrary to all authorities and at the very least, there must be mutuality of remedy at the date of the decree.

4. As the appellee's interest in this agreement was only incidental, appellee does not fall within any exception to the general rule that a stranger to a contract may not sue to enforce its terms.

5. The judgment of the lower Court is incomplete and it is inequitable to require appellant to forfeit his stock without clarifying his rights to his business.

6. As Appellant's resignation was not accepted as tendered, it was at least tantamount to a "request to resign" which called for payment of the amount invested, not par value.

ARGUMENT

I.

The *Special Agreement between associates of the McLaughlin Company* is a document signed by nine individuals on or about November 16, 1955, one more individual on June 30, 1959 and another on March 17, 1960. These individuals were all associates of appellee and derived their income from commissions. What was the purpose of the agreement and what were the rights and obligations of the parties? Certainly, if this is a valid agreement, these questions must be answered by the words contained in the four corners of the document.

An examination of this instrument shows that it contains nothing more than hopes, intentions or agreements to make agreements. First of all, the agreement mentioned the "insurance and bonding business of the deceased associate," stating that it shall be handled by the "several living Associates" with payments to a designated beneficiary over a period of time and then become the property of the appellee. The agreement does not state who is to handle the business, only to hold a meeting to decide and it does not state who is to make these payments to the beneficiary. What, then, are the rights and obligations of the parties? Who is to say? What is the consideration? Certainly, not a promise for a promise, because the identity of the promisor is unknown. This can be nothing more than an expression of intention.

The next paragraph gives the company a right to carry life insurance on each associate *with the company designated as beneficiary,* pay the proceeds to the widow, after deducting any indebtedness, to change the amount of insurance "from year to year" and to purchase additional insurance at the company's discretion. Obviously, since the company was to be the designated beneficiary of all life insurance, there was no benefit or promise to the associate. The only remote benefit is the statement that payment shall be made to the widow, but

as this payment could come only from the company and the company was not a party to the agreement, it could not be enforced and, therefore, is totally lacking in consideration.

Thirdly, the agreement says that the stock of a deceased associate "shall be returned to the company" with payment therefor by the company over a three-year period. Once again, this covenant lacks consideration for the same reason that the company was not a party to the agreement.

The next paragraph contains the words which form the basis of this suit. It is again totally lacking in consideration or obligation between the parties. There is no promise by one of the associates to the other and in this instance there is not even a promise attributable to the company. It simply appears to be an option without consideration.

The final paragraphs could not be said to contain anything more than expressions of intention to try to adjust differences. While these are commendable thoughts, they cannot be said to be promises or consideration for a legal agreement.

The two extension statements are signed without any known or recited consideration and, therefore, cannot be said to give validity to the original agreement.

Even appellee would concede that some consideration is an absolute prerequisite to any enforceable agreement. Therefore, no extensive authorities are cited for this basic legal principle. This Court said in *Littlepage v. Neal Publishing Co.*, 34 App. D.C. 257 (1910), that "there must always be a consideration for the promise upon which a recovery is sought." As there is absolutely no consideration in this agreement for any alleged promise, the agreement must fail.

II.

A Court of equity should not decree specific performance of a contract unless the terms thereof are definite and certain. This rule of law is so well established by this Court, in fact by all Courts, that citation of authority is probably unnecessary.

This Court stated in *Crowell v. Gould,* 69 App. D.C. 297, 96 F.2d 569, at page 300 of the opinion:

> "In fact, there must be such clarity as to the meaning of the contract, and the pleader's right thereunder, that the Court can require the specific thing to be done. It cannot substitute a contract of its own making for that of the parties."

In 81 C.J.S., Specific Performance, Section 31, pages 480-3, the following rule is set out:

> "In order to warrant a decree of specific performance thereof, a contract must be definite and certain, and further, a contract must be free from doubt and vagueness, as well as from ambiguity, in its essential elements, and in all, or at least all its material, terms. Clearness is required. The terms of the contract must be so clear, definite, certain, and precise, and free from obscurity or self-contradiction, that neither party can reasonably misunderstand them, and the Court can understand and interpret them without conjecture and without supplying anything or supplanting vague and indefinite terms by clear and definite ones through forced or strained construction."

The pertinent part of the contract in this case first states "that the business of each living associate is legally his own business." What does this mean? What are the rights thereunder? Who gives "each living associate" his business? Does he receive his business before he forfeits his stock? Or after?

Next the contract says, "However, should the associate leave the organization he shall forfeit his stock interest in the company." What

is meant by "leave the organization"? Does this mean leave temporarily, permanently, or what? Is retirement the type of *leave* contemplated, or is it a year's *leave* of absence, or is it *leave* to go in the insurance business, or is it *leave* to go in some other business? And on and on.

What is meant by the word "forfeit"? Courts of equity do not like forfeitures and generally refuse to enforce them. Therefore, the Chancellor must rewrite this part of the contract— the parties *did not* mean "forfeit" (JA 12); they meant "should reconvey his stock interest to the company." Assuming, for the sake of argument, that this is a proper rewriting by the Chancellor, the contract is now even more indefinite. There is no time stated for the reconveyance; forfeiture implies immediacy. Further, there is no date fixed for payment, terms of payment—cash or credit, or person obligated to make payment.

The Georgia Court was faced with a somewhat similar problem in *Crane v. State,* 98 S.E. 2d 901, 213 Ga. 319 (1957). In that case the stockholders of a closely held corporation had an agreement endorsed on each stock certificate giving the stockholders a six months option to purchase the stock of one wishing to sell his shares. The agreement fixed the price at "market value or true value." Specific performance of the agreement was denied because the Court did not know the meaning of the terms "market value or true value" and because there was no provision as to how the stock was to be paid for—cash or credit, or who was to buy the stock.

While the contract in the case at bar may not have the identical defects as in the *Crane* case, as it has been pointed out above, it certainly has its own share of ambiguities, to wit:

1. Under what types of "leaving" was the stock to be reconveyed?
2. How long after leaving?

3. Who was to pay for the stock?

4. Was payment to be in cash or on credit?

5. Was receipt of "his own business" a condition precedent to the reconveyance?

Since this contract was not free from self-contradictions and was not so clear that there is no misunderstanding as to its meaning and effect, it could not form the basis of a suit for specific performance. In such actions the Courts have required a greater degree of certainty than in an action at law for damages. This principal is well stated in a quotation from Page on the Law of Contracts in *Beidler v. Davis*, 50 N.E.2d 613, 72 Ohio App. 27 (1943), at page 615 of the opinion:

> "Certainty—General Principles. To be enforceable, either at law or in equity, a contract must be definite and certain. *Certainty is especially necessary if specific performance is sought,* since the court must necessarily decree performance of the contract in such terms that the party against whom the decree is entered can ascertain from the decree itself what he is bound to do; and unless the contract itself is definite, the court can not frame a definite decree. The same idea is expressed in other words when it is said that the court can enforce a valid contract by specific performance, *but that it can not make a contract for the parties if they have not made one for themselves in sufficiently definite terms.* Accordingly, specific performance may be refused because the contract is indefinite and uncertain * * *." (Italics supplied.)

III.

There is extensive authority dealing with the mutuality of obligation and remedy required of a contract in order to have specific performance. There is no authority to support the lower Court's holding

in this case that the law does not require any mutuality. However, assuming *arguendo* that there is mutuality of obligation, there still must be mutuality of remedy.

The older cases followed the "Fry Rule." See *Rutland Marble Co. v. Ripley* (1870) 10 Wall. 339, 19 L.Ed. 955, and *Norris v. Fox* (1891, CCND) 45 F. 406:

> "A contract to be specifically enforced by the Court must be mutual—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

The same rule was followed by this Court in *Crowley v. Crowley,* 56 App. D.C. 340, 13 F.2d 311 (1926), which was an action for specific performance of a real estate contract resulting from a court sale, the terms of which required "good record title." The title to the property was defective at the time the contract was made, but it was subsequently cleared two years later. When the purchaser failed to make settlement, a decree for specific performance was granted and the purchaser appealed. The decree of specific performance was reversed and this Court stated at page 341 as follows:

> "The right of specific performance depends upon the relation of the parties with respect to the contract at the time of the sale. It is clear that plaintiffs at that time were not in position to deliver a good title, and consequently could not have been compelled to specifically perform their agreement."

The *Crowley* case has not been reversed and is still the law of this jurisdiction. However, there has been a general relaxation of the

strict rule of mutuality of remedy at the time the contract is entered into and the modern federal view now seems to be that mutuality of remedy is sufficient if it exists at the time a suit is filed or in some instances on the date of the decree, 22 A.L.R. 2d 574.

Assuming that this court might now follow this later line of reasoning, it is pertinent to examine the rights of the parties at the time suit was filed. As of that date, appellee was not a party to the contract and had no obligations or liabilities thereunder. Appellant had no cause of action against appellee. Now, as of the date of the decree, had there been any change? No, and even the lower Court recognized this for the decree reads "upon the payment, etc." Therefore, it is clear even then that appellant had no right to force payment and could not even to this day. Surely then, no mutuality of remedy exists and consequently no right to specific performance.

IV.

The general rule is that a stranger to a contract may not bring suit to enforce its terms. *Marranzano v. Riggs Nat. Bank,* 97 U.S. App. D.C. 195, 184 F.2d 349 (1950). One exception to this rule is in the case of a third party beneficiary. However, the third party beneficiary must have a direct interest in the contractual obligation, *not an incidental one,* in order to bring suit on the contract.

The lower Court wrongly held that the doctrine of the third party beneficiary applied to this case (JA 14). The reason for this holding was apparently because "this provision is for the benefit of the company." How does the appellee have a direct interest in the associates' alleged agreements as to how their business was to be handled in the event of death, leaving or disability? The only possible interest would be appellee's desire to acquire its own stock for far less than its fair value. If there ever was an *incidental* interest, this must be one. Most

corporations are interested in operating for the benefit of *all* their stockholders, not in repurchasing their own stock.

The claim of a third party beneficiary has been considered in the following cases in this jurisdiction, to wit: *Hall v. Gardiner*, 75 U.S. App. D.C. 226, 126 F.2d 227 (1942); *Schwartz v. Brown*, 64 A.2d 298 (1949); *Marranzano v. Riggs Nat. Bank, supra*, and *Guinn Company v. Mazza*,111 U.S. App. D.C. 319, 296 F.2d 441 (1961).

In only the *Marranzano* case was the claim of the third party held to be more than incidental to the contract and recovery permitted. In that case the agreement was between employer and union and for the *direct benefit* of the member of the union bringing suit against the employer. Not so in the instant case, for the only *direct benefits* intended were for the individual associates and not the appellee.

V.

An equity Court granting specific performance should treat both parties fairly. It is unreasonable to order appellant, on the one hand, to sell his stock for a fraction of its fair value and then, on the other, leave him to make application at the foot of the decree to secure "his business" or find out what is meant by "his business" before a special master.

The Court's judgment is incomplete and carries forward the same confusion as the contract which the Court describes as "inarticulately drawn." What is the meaning of the term "concerning or relating to subsisting policies of insurance, the sale of which to customers are controlled by defendant." Does this mean policies which were appellant's on the day he left the company in March 1962 or on the day of the Judgment in April 1964? If appellant's business was his "own," it must relate back to the policies he had in 1962. Obviously, policies which had not been delivered to appellant during a two-year

period could not be controlled by him in 1964. Therefore, this part of the order is meaningless and incomplete as written.

It is well settled that the Court may impose certain requirements as a condition to granting specific performance, *Smith v. Taylor,* 65 App. D.C. 40, 79 F.2d 165 (1935). However, there is no authority permitting the Court to enter a partial decree which places the burden on the defendant to seek clarification of the Court's own Order.

The first part of the paragraph upon which this suit is based states that "the business of each living associate is his own business." This is the paramount provision of this paragraph and the one which must be carried out in order to have *forfeiture* of the stock. It is the only possible consideration for the *forfeiture*. As the Court found that appellee had retained a part of appellant's business records, it was mandatory for the Court to make a precise finding as to what was meant by "business" and enter a clear judgment ordering appellee to deliver said "business" to appellant.

VI.

The facts of this case show that appellant tendered his resignation on March 1 to be effective on March 31. Twenty-six days before appellant wished to leave, he was directed to leave immediately and turn in his keys. Is this not a "request to resign"? Certainly, the voluntary aspects of the resignation were removed when appellant was forced to leave immediately.

What would be the position of an associate who was to reach age sixty-five on March 31 and announced his retirement on the 1st of the month and was then dismissed on the 5th? Would he be required to forfeit his stock for par value, or would he receive back the amount he paid? If the lower Court's ruling is correct, the retiring associate, who surely was to "leave," would get the same par value. There is no

reason to punish a man because he wants to go in business for himself or to retire.

While the agreement does not specify what shall happen under the circumstances of this case, it appears clear that appellant's departure was closer to being "asked to resign," than to a purely voluntary leaving. If appellant had been permitted to finish out the month and make an orderly transfer of his business, his position would have been far easier and he would have been able to take his business with him. In that event, payment of par value would have been far less a hardship.

Since the agreement specified the higher payment in the event of an involuntary departure, it is only equitable that appellant should not be required to suffer a forfeiture of $15.00 per share—the difference between par value ($10.00 per share) and what he paid ($25.00 per share). This is particularly true since our courts have long looked with disfavor on forfeitures. See *Van Buren v. Digges*, 52 U.S. 461, 477, 13 L.ed 771 (1850); *Capital City Ben. Soc. v. Travers*, 55 App. D.C. 214, 4 F.2d 290 (1925).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Judgment of the lower Court granting specific performance should be reversed and Judgment entered for the appellant.

Respectfully submitted,

BRAINARD H. WARNER, III
919 - 18th Street, N. W.
Washington, D. C.
Attorney for Appellant

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JOINT APPENDIX

[Filed August 20, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE McLAUGHLIN COMPANY, a corporation 1121 15th Street, N.W. Washington, D. C. Plaintiff,	)	
v.	)	Civil Action No. 2651-'62
HUNTINGTON T. BLOCK Wyatt Building 777 14th Street, N.W. Washington, D. C. Defendant.	)	

COMPLAINT TO REQUIRE DELIVERY OF SHARES OF STOCK

1. This is a suit which invokes the general equity powers of the Court and involves property in excess of the value of Three Thousand Dollars ($3,000.00).

2. Plaintiff is a corporation organized under the laws of the State of Maryland, doing business in the District of Columbia. Its principal office for the transaction of business is in the District of Columbia, where its books, records and accounts are principally maintained. Defendant is a citizen of the United States, doing business in the District of Columbia and is sued in his own right. Plaintiff and defendant compete with each other in the sale of insurance in the District of Columbia and the environs thereof.

3. On to wit the 16th day of November, 1955, and for a long time prior thereto, defendant was associated in business with plaintiff. On or about said date and time by agreement in writing between the parties hereto, defendant agreed that should he leave plaintiff's organization, he would surrender his stock interest in plaintiff company, receiving payment for the same at par value for each share thereof. Said agreement

was from time to time extended and was and is in full force and effect.

4. On or about March 1, 1962, defendant was the owner of One Hundred Ten (110) shares of the capital stock of plaintiff corporation of the par value of Ten Dollars ($10.00) each. On or about said date and time, defendant resigned his association with plaintiff corporation, whereupon it became and was his duty to surrender his shares of stock in said corporation and accept One Thousand One Hundred Dollars ($1,100.00) in full payment therefor.

5. Plaintiff tendered and continues to tender to defendant One Thousand One Hundred Dollars ($1,100.00) for One Hundred Ten (110) shares of the capital stock of plaintiff corporation and demanded that defendant surrender his shares of stock in accordance with his agreement. Although thereunto requested, defendant fails and refuses so to do.

6. Plaintiff avers that its stock is not bought and sold nor held by the public, nor in connection with any financial markets; that its stock is closely held and only by persons associated with it in the conduct of its business; that One Hundred Ten (110) shares of its stock is of a value in excess of Three Thousand Dollars ($3,000.00) but is without ascertainable market value.

7. Plaintiff avers that it is without adequate remedy at law and that the award of money damages for the breach of the agreement of defendant will not grant plaintiff full relief; that defendant as a competitor of plaintiff ought not be permitted to maintain his status as a stockholder of plaintiff corporation and as a stockholder to obtain confidential information concerning the business and the affairs of plaintiff; that defendant as a competitor of plaintiff and not associated with it in the conduct of its business ought not be permitted to exercise any control of plaintiff's business as a stockholder of plaintiff.

8. Wherefore being without adequate remedy at law, plaintiff demands:

(1) That defendant be enjoined by this Court to require him to deliver to plaintiff One Hundred Ten (110) shares of stock of plaintiff

corporation in possession of defendant for a consideration of One Thousand One Hundred Dollars ($1,100.00).

(2) That defendant be enjoined pendente lite and permanently from disposing of, transferring, hypothecating or otherwise alienating said shares except in performance of his agreement with plaintiff.

9. That plaintiff be awarded its costs and such other and further relief as to the Court may seem meet and proper.

THE McLAUGHLIN COMPANY
By: /s/ John F. McLaughlin

KING & NORDLINGER
By: /s/ Bernard I. Nordlinger

Bernard I. Nordlinger
Attorneys for Plaintiff
419 Southern Building
Washington 5, D. C.

DISTRICT OF COLUMBIA SS:

John F. McLaughlin being first duly sworn according to law and oath deposes and says he is president of plaintiff corporation; that he is duly authorized to subscribe the name of said corporation to the foregoing complaint; that he has read the foregoing complaint and knows the contents thereof; that he verily believes the allegations therein contained to be true.

/s/ John F. McLaughlin

Subscribed and sworn to before me this 16 day of August, 1962.

/s/ Peter Burich
Notary Public

[Filed November 20, 1962]

ANSWER TO COMPLAINT

First Defense

The Complaint fails to state a cause of action upon which relief can be granted.

Second defense

1 - 2. Defendant admits the allegations contained in paragraphs numbered 1 and 2 of the Complaint except that the Defendant denies that the Plaintiff and Defendant compete with each other in the sale of insurance as alleged in paragraph numbered 2.

3. Answering paragraph numbered 3 of the Complaint, Defendant admits that on the 16th day of November, 1955 and for a long time prior thereto, Defendant was associated in business with the Plaintiff and on or about said date and time, an agreement in writing was executed by the Defendant. Defendant neither admits nor denies the remaining allegations of paragraph numbered 3, but avers that said agreement and extensions thereof set forth the relations between the parties hereto, if any, regarding surrender of stock.

4. Defendant admits that on or about March 1, 1962, Defendant was the owner of 110 shares of the capital stock of Plaintiff corporation, but denies the remaining allegations contained in paragraph numbered 4 of the complaint.

5 - 7. Answering paragraphs numbered 5, 6 and 7 of the Complaint, the Defendant admits that he is still the owner of 110 shares of capital stock of the Plaintiff corporation and that he has refused to surrender his shares to the Plaintiff. The Defendant denies that the Plaintiff has tendered any money to him and is without sufficient knowledge or information to either admit or deny the remaining allegations in the Complaint.

WHEREFORE the premises considered, the Defendant prays that the Complaint be dismissed and the Defendant awarded his costs.

KASLOW AND WARNER

By: /s/ Brainard H. Warner III
Attorneys for Defendant

[Certificate of Service]

* * *

[Filed September 26, 1963] September 25, 1963.

PRETRIAL PROCEEDINGS

Action for specific performance to transfer shares of corporate stock.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO: On Nov. 16, 1955, associates of the McLaughlin Company, an insurance general agency, doing business in the D of C, entered into an agreement to take effect Nov. 1, 1955, to end Oct. 31, 1956. D was one of the associates who signed this agreement. On Nov. 8, 1957, said agreement was extended "until such time as terminated by mutual consent.", which extension D signed.

P is a Md. corp. D is the owner of 110 shares of P company stock.

On or about March 1, 1962, D submitted an oral resignation from the association, to be effective March 31, 1962 in order to engage in the insurance business in the Wash. area in his own name.

PLAINTIFF seeks to recover the 110 shares of stock which D still holds, asserting that the contract bet. P and D provided at the bottom of page two that as each associate should "leave the organization, he shall forfeit his stock interest to the company, receiving payment for the same at par value for each share..." The par value of each share of P corp. stock was Ten Dollars ($10). D owns one hundred ten (110) shares, total value $1100.

When D did leave the organization, although P tendered $1,100.00 to D, for his shares, he failed and refused to deliver the shares.

DEFENDANT asserts that he has not been a member of the association since about Mar. 5, 1962 and has not received all of his business from the P and asserts the following defenses to P's request for specific performance:

1. P is not a party to said agreement.
2. Said agreement is not sufficiently clear in its terms to form

the basis of a suit for specific performance.

3. D did not receive all of his business as required by said agreement.

4. D did not "leave the organization" in such a manner as to be required to receive payment of only par value for his stock.

STIPULATIONS

The agreement marked P-1, initialled by Examiner, and in P's counsel's possession, may be admitted in evidence at the trial.

The following may be admitted in evidence subject to all objections as to materiality and relevancy; documents initialled by Examiner which are listed in the attachment marked "A," except iii, iv, vi, ix, xviii, xx and xxi, opposite each of which the Examiner has written "No".

The parties agree to file with the Clerk of the Court and to mutually exchange, on or before Oct. 16, 1963, a list of the names and addresses of all witnesses known to them, including expert witnesses, who have knowledge of any aspect of this case, indicating those who may be used at the trial. Impeachment witnesses are not to be included.

As to the documents listed on attachment "A", excluded from the foregoing agreement, P asks D to agree they may be admitted in evidence, but D will make no agreement with reference thereto.

P requests an agreement that the par value of each share of P's corporate stock is $10.00. D refuses to agree.

P has tendered and now tenders to D $1,100.00 for 110 shares of the capital stock of P corporation.

The Examiner has requested counsel for D to appear at trial with the maximum amount of authority to settle this case which will be allowed him by his principal.

Trial Counsel:

/s/ Bernard I. Nordlinger, Esq. for P
/s/ Brainard H. Warner, III, Esq. for D

/s/ John J. Finn
Pretrial Examiner

Note: This suit is brought by a corporate entity. The agreement upon which suit is based was executed between "associates." I commented upon this at pretrial, but no reaction of counsel ensued.

/s/ John J. Finn

PLAINTIFF'S EXHIBIT No. 3 16 November 1955

SPECIAL AGREEMENT BETWEEN ASSOCIATES OF THE McLAUGHLIN COMPANY TO TAKE EFFECT NOVEMBER 1, 1955 AND TO END OCTOBER 31, 1956 UNLESS OTHERWISE EXTENDED BY MUTUAL AGREEMENT

In an effort to meet contingencies arising out of the death of an associate of The McLaughlin Company whose income is on a commission basis, the undersigned agree to the following procedures.

The insurance and bonding business of the deceased associate shall be renewed and serviced by the several living associates. As to which associate will service particular accounts, this shall be decided by discussion meetings of the living associates, presided over by the President. The full agent's commission, which had been enjoyed by the deceased associate during his association with this company, shall be paid to his wife, estate, or any other designate. A letter of his selection of beneficiary of this arrangement is to be attached to this agreement. The payment of these commissions shall continue for three renewals, in the case of annual renewals, and one renewal in the case of three-year or five-year renewals, and shall be made monthly on these items paid within each respective month.

It is further agreed that with respect to the aforesaid portion of this agreement, those associates who have not been receiving remuneration on a commission basis shall sign an additional agreement in order to properly compensate their wife, estate, or other designate by reason of the death of that associate.

At the conclusion of the payment of commissions to the wife, the estate, or other designate of the deceased associate, the future business shall then become the property of The McLaughlin Company, with the commission payable annually to the associate who has serviced the particular account as per the aforegoing agreement.

The company shall carry a life insurance policy on each associate in the amount of $5,000.00, which premiums will be paid for out of its regular company income, with the company as beneficiary and the proceeds of the policy shall be paid immediately to the wife, the estate, or

other designate, less any legitimate indebtedness to the company which may exist, upon the death of the associate. The amount of this insurance policy shall be subject to change, with full concurrence of all associates, from year to year. The company, at its discretion, can purchase additional insurance on each associate, with the company as beneficiary, to compensate the company for loss of new production and other expenses incidental to the death of an associate.

The stock of the company, which has been held by the deceased associate, shall be returned to the company. Payment for the same shall be made on the basis of the book value of the stock at the time of the death of the associate, plus a ten percent additional payment on the basis of good will value of the stock. Payment for this stock transaction is to be made by the company over a three-year period, minimum payment to be at least one-third annually.

It is further agreed that the business of each living associate is legally his own business; however, should the associate leave the organization, he shall forfeit his stock interest to the company, receiving payment for the same at par value for each share, less any legitimate indebtedness the associate may have with the company. Should an associate be requested to resign, which resignation could be brought about by the vote of a majority stock ownership, his stock interest must be relinquished to the company, payment for same to be made on the basis of the amount the associate paid for such stock. This payment shall also be paid, less any legitimate indebtedness the associate may owe to the company.

In the event of the severance of an associate connection with the company for any reason other than death, the life insurance agreements outlined herein shall become null and void.

In the event of a prolonged illness of an associate, his business shall be carried on by the company and the component associates, with full commission on new and renewal business paid to the associate; however, this condition should be reviewed approximately one year from

the date of the original incapacity of the associate to ascertain on what equitable basis the matter will be handled from thereon.

It is further agreed that if this agreement is signed by a majority of the associates and not signed by a minority of the associates, the President shall call a special meeting with the thought in mind of adjusting differences and in event such differences cannot be adjusted, appropriate action shall be taken by the company to effect an equitable solution.

This agreement is to take effect the first day of November 1955 and is to continue in force through October 31, 1956 unless otherwise extended by mutual agreement.

Signed: Associate	Beneficiary
/s/ Huntington Turner Block	Amie Willard Block
/s/ Howard de Franceaux	Virginia de Franceaux
/s/ Victor Galin	Lola Galin
/s/ William J. Horner	Katherine W. Horner
/s/ John F. McLaughlin	Helen R. McLaughlin
/s/ Gordon F. McLelland	Cecil McLelland
/s/ John T. Pappas	Priscilla R. Pappas
/s/ A. R. Lujack	Katherine K. Lujack
/s/ John B. Clark	Adeline B. Clark
/s/ Ralph Guglielmi [6/30/59]	Rose Guglielmi
/s/ Bainbridge Eager [3-17-60]	Ellen W. Eager

We hereby agree to the extension to December 31, 1957 of Special Agreement Between the Associates of The McLaughlin Company, dated November 16, 1955.

This agreement is to remain in effect until December 31, 1957 unless otherwise extended by mutual consent.

/s/ Gordon R. McLelland	/s/ Ralph Guglielmi [6/30/59)
/s/ John F. McLaughlin	/s/ Bainbridge Eager [3-17-60]
/s/ Victor Galin	
/s/ John T. Pappas	
/s/ Howard de Franceaux	

November 8, 1957

We, the undersigned, agree to the extention of the Special Agreement Between the Associates of The McLaughlin Company, (dated November 16, 1955) until such time as terminated by mutual consent.

/s/ John B. Clark

/s/ Victor Galin

/s/ John F. McLaughlin

/s/ G. R. McLelland

/s/ W. J. Horner

/s/ Huntington T. Block

/s/ Howard de Franceaux

/s/ Al Lujack

/s/ John T. Pappas

6/30/59 /s/ Ralph Guglielmi

3-17-60 /s/ Bainbridge Eager

PLAINTIFF'S EXHIBIT #4

Secretary-Treasurer, Victor Galin, read the minutes of the meeting of stockholders of the corporation held on the 15th day of January 1956. The Board of Directors did thereupon proceed to the election of officers as provided in said By-Laws, and the following gentlemen were unanimously elected officers of the company to serve until the next annual meeting and until their successors are elected and qualified:

President	John F. McLaughlin
Vice President	Huntington T. Block
Vice President	Howard de Franceaux
Vice President	John T. Pappas
Vice President	William J. Horner
Secretary-Treasurer	Victor Galin

After the election of officers, the financial operations of the corporation were discussed. Although the operations for the year 1955 resulted in a net loss, it was generally agreed that the company's position for the future was greatly increased as a result of certain procedures initiated during the past year.

On motion duly made and seconded, it was resolved that a dividend of 50¢ a share be paid to stockholders of record as of December 31, 1955.

The Board of Directors approved and ratified a special agreement between associates of the McLaughlin Company, dated November 16, 1955, such agreement outlining the procedures to be followed in the event an associate dies or terminates his association with the McLaughlin Company. This agreement, attached hereto, is to take effect the first day of November 1955 and is to continue in force through October 31, 1956, unless otherwise extended by mutual agreement.

There being no further business, the meeting was adjourned.

/s/ John F. McLaughlin

/s/ John T. Pappas

/s/ Howard de Franceaux

/s/ Victor Galin
Secretary-Treasurer

ORAL OPINION OF THE COURT

1 Washington, D. C.
April 21, 1964

The above cause came on for further trial before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge.

*   *   *   *   *

2 PROCEEDINGS

*   *   *   *   *

OPINION OF THE COURT

THE COURT: This is an action for specific performance of an agreement entered into between certain individuals who are described as associates of the plaintiff corporation and the defendant, who was one of the associates and was connected with the plaintiff's corporation.

The provision of the contract involved in this action provided that, should any associate leave the organization, he "shall forfeit his stock interest in the company, receiving payment for the same at par value for each share."

This contract is inarticulately drawn. Quite obviously it was not drawn by a lawyer. The word "forfeit" is not a felicitous choice of words because obviously no forfeiture is provided for.

The clear intent of the provision is that the associate leaving the organization should reconvey his stock interest to the company at the price of par value for each share, and the Court so construes that provision.

The plaintiff corporation has been for many years engaged in the general insurance business. As part of the organization are a number of young men whose business is to solicit insurance. Their income is
3 derived solely or almost entirely by commissions on business which they bring in or handle.

In 1948 the defendant was brought into the business by the head of the organization, John F. McLaughlin, who is the president of the plaintiff corporation. The defendant grew up in the business. In 1955 he was

admitted into the firm, so to speak. An agreement was entered into between the associates of the McLaughlin Company to take effect on November 1st, 1955 and to end October 31st, 1956. This agreement was executed by the various associates and Mr. McLaughlin, the president of the company. This agreement provided for the contingency of the death of any associate and also for the contingency of any associate severing his connection with the business. The pertinent provision reads as follows:

> "It is further agreed that the business of each living associate is legally his own business. However, should the associate leave the organization he shall forfeit his stock interest in the company, receiving payment at par value for each share, less any legitimate indebtedness the associate may have with the company. Should an associate be requested to resign, his stock interest must be relinquished to the company, payment for same to be made on
> 4 the basis of the amount the associate paid for such stock."

The defendant acquired 110 shares of stock of the par value of $10 a share. He testified that some of the stock was given him as a bonus but that he purchased the larger part of it on terms at the price of $25 per share.

There came a time when the defendant apparently desired to go into business by himself. He made arrangements to do so and leased office space for that purpose. Having completed his arrangements he then on March 1st, 1962 came in and announced to Mr. McLaughlin his resignation. This apparently took Mr. McLaughlin by surprise as evidently he had valued Mr. Block's affiliation with the company and regretted to see him leave. The discussion evidently developed into a clash of tempers. On the 5th of March a meeting between Mr. McLaughlin and the defendant and several associates was had for the purpose of discussing the method of terminating the defendant's connection with the organization. The defendant's resignation as originally tendered

was to take effect on the 31st of March. Unfortunately, the meeting broke up in another clash of tempers and the defendant was asked to leave the organization at that time, to take his belongings and to leave
5 the keys.

This suit is brought to compel the defendant to convey to the corporation his 110 shares of stock at the price of $10 a share as the contract provides.

It is first claimed in behalf of the defendant that the agreement was made between the associates and the corporation was not a party thereto and therefore may not recover in this action. The agreement provides, however, that should the associate leave the organization he should forfeit his stock interest to the company, receiving payment for the same at par value for each share.

The Court is of the opinion that the doctrine of the third party beneficiary applies, that this provision is for the benefit of the company and the company may enforce it.

It is then argued that the severance of the defendant's connection with the company was not by resignation because his resignation would have taken effect on March 31st, whereas he was asked, after tendering his resignation, to leave immediately. The Court overrules this defense because actually the termination of the relationship was in essence and in spirit a resignation. All that the other associates did was to move up the date on which the resignation was to take effect.

6 It is then claimed that the contract is unenforcible in equity on the ground that it is lacking in mutuality, namely, that there was no reciprocal agreement binding the company to buy back the stock in the event of an associate's resignation. There are indeed many cases holding that mutuality of obligation or mutuality of remedy is required in order that equity may use its discretion to grant specific performance of a contract. That rule, however is not inexorable. The circumstances of this contract are such that each associate controls his own business. When the associate leaves the business he takes his clients or customers with

him; they do not remain with the company. Consequently, the defendant would be in a position to take away with him or was in a position to take away with him a considerable amount of business from the company and, in addition, to compete with the company both in respect to the old customers and potential new customers. It would be inequitable to permit the defendant under these circumstances to continue a stock interest in the company, which was, after all, a nominal matter as compared with the entire business, because the bulk of the income of the associates came from commissions and not from dividends on the stock. It is quite apparent that the principal purpose of the stock was to control the company, and it would be inequitable to
7 permit the defendant to participate in the control of the company after he has left it.

It is questioned by counsel for the defendant whether this is an appropriate contract to be enforced specifically and whether the plaintiff should not be left to his claim for damages. Manifestly it is not every contract for the sale of stock in respect to which specific performance may be granted. A stock that can be bought on the open market from day to day is in a different position from closely held stock, the purpose of which is to control a business operated by a small group of persons.

This stock cannot be purchased on the open market. Therefore, damages would not be an adequate remedy and the Court is of the opinion that the strong arm of equity should be extended to grant specific performance of a contract such as this.

Finally, it is claimed that the plaintiff has declined to surrender to the defendant the records of some of the business which the defendant claims to be his. Apparently there may be a bona fide dispute as to come of the records, although admittedly the major portion of the records or copies thereof have been turned over.

Accordingly, the Court will grant specific performance of the
8 contract and direct the defendant to convey the stock to the plaintiff

corporation at its par value, namely $10 a share. However, the plaintiff will be required to turn over to the defendant any records or copies thereof concerning and relating to business controlled by the defendant. If there is any dispute as to any particular records the matter will be left to future adjustment on an application that may be made at the foot of the decree. If necessary, a special master will be appointed, although the Court hopes that this expenditure will not have to be incurred.

A transcript of this oral decision will constitute the findings of fact and conclusions of law. Counsel may submit a proposed judgment.

MR. NORDLINGER: Thank you, Your Honor.

MR. WARNER: May I address the Court very briefly?

THE COURT: Yes.

MR. WARNER: May it please the Court, I think the decision is very just and equitable, as I expected from Your Honor. The only point that I would like some clarification on is in the event that business that has not been turned over to the defendant has resulted in commissions being earned purely by the plaintiff and not paid to the defendant, I think it should be understood that we would share in our normal way
9 those commissions as they had been shared in the past.

THE COURT: I wonder if that cannot be adjusted between counsel. Both of you are reasonable gentlemen, you are both well known to the Court and are members of the bar in high standing. I am sure counsel can adjust that. If not, you may make an appropriate application at the foot of the decree.

MR. WARNER: Thank you, Your Honor.

(The trial stood concluded.)

[Filed April 27, 1964]

JUDGMENT FOR PLAINTIFF FOR SPECIFIC PERFORMANCE

This cause came on to be heard at this term of Court and thereupon after taking testimony in open Court on April 20, and April 21, 1964, and oral argument of counsel having been concluded, the Court at the conclusion of the hearing having delivered its opinion orally and ordered that a transcript thereof shall serve as its findings of fact and conclusions of law, it is by the Court this 27th day of April, 1964,

ADJUDGED, that upon payment by plaintiff to defendant of One Thousand One Hundred Dollars ($1,100), defendant be and he hereby is ordered to transfer by execution of due and proper assignment and deliver, to plaintiff all and singular certificates for one hundred ten (110) shares of the capital stock of plaintiff corporation, and in case of default in execution of said assignment and delivery of said shares by defendant, then this decree shall stand as and for a conveyance of said shares.

FURTHER ADJUDGED, that upon request of defendant, plaintiff shall from time to time hereafter deliver to defendant any and all records or copies thereof, concerning or relating to subsisting policies of insurance, the sale of which to customers are controlled by defendant.

FURTHER ADJUDGED, that jurisdiction of this cause be and the same hereby is retained for the enforcement of this Judgment, and that either party may make application at the foot of the decree. A.H.

/s/ Alexander Holtzoff
Judge

* * *

[Certificate of Service]

[Filed May 26, 1964]

NOTICE OF APPEAL

Notice is hereby given this 26th day of May, 1964, that Defendant, Huntington T. Block, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 27th day of April, 1964 in favor of Plaintiff, The McLaughlin Company against said Defendant, Huntington T. Block.

/s/ Brainard H. Warner, III
Attorney for Defendant
919 - 18th Street, N. W.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,858

HUNTINGTON T. BLOCK,

Appellant,

v.

THE McLAUGHLIN COMPANY,

Appellee

Appeal From the United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 18 1965

Nathan J. Paulson
CLERK

BERNARD I. NORDLINGER
WILLIAM P. DAISLEY

419 Southern Building
Washington 5, D. C.

Attorneys for Appellee

Of Counsel:

KING & NORDLINGER
419 Southern Building
Washington 5, D. C.

STATEMENT OF QUESTION PRESENTED

Whether one of the stockholders of a closely held corporation may be required by the corporation specifically to perform the agreement of substantially all of the stockholders and all of the officers of the corporation to the effect that when one of them leaves the organization he should reconvey his stock to the corporation at par value, the agreement having been formally ratified and approved by the Board of Directors of the corporation soon after its execution.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,858

HUNTINGTON T. BLOCK,

Appellant,

v.

THE McLAUGHLIN COMPANY,

Appellee

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant hereinafter sometimes called "defendant," in the Trial Court called the decision "very just and equitable" (JA 16) but nevertheless has taken an appeal therefrom. The Judgment was for specific performance. The Trial Court, sitting as in equity without a jury, ordered defendant to transfer to Appellee, hereinafter sometimes called "plaintiff," 110 shares of the capital stock of plaintiff corporation at a price of $10.00 per share, the par value thereof. Jurisdiction was retained for the purpose of enforcing the Judgment. Plaintiff was ordered to deliver to defendant copies of documents concerning or relating to subsisting policies of insurance which defendant might control in the sale to customers (JA 17).

The action below was for specific performance of an Agreement (JA 7 *et seq.*) entered into between individuals who were described as associates of the plaintiff corporation and defendant, who was one of the associates and was an officer of plaintiff corporation. The Agreement provided that if any associate should leave the organization, he "shall forfeit his stock interest to the company, receiving payment for the same at par value for each share" (JA 8). No actual forfeiture was provided for. The clear intent of the contract was that the associate leaving the organization should reconvey his stock interest to the company at the price of par value for each share and the Trial Court so construed that provision (JA 12).

Plaintiff corporation had been for many years engaged in the general insurance business. The insurance business was operated by a number of men whose business it was to solicit the insurance and their income was derived solely, or almost entirely, from commissions on business which they brought in or handled (JA 12).

In 1948, defendant was brought into the business by the President of plaintiff corporation and defendant grew up in the business (JA 12).

In 1955, an Agreement was entered into between the associates of the plaintiff corporation. All corporate officers signed the Agreement (JA 10, 11). It provided for a number of contingencies which required action by plaintiff corporation to fulfill (JA 7 *et seq.*). For instance, in case of death of any one of the men, it was contemplated that "the full agent's commission, which had been enjoyed by the deceased associate during his association with this company, shall be paid to his wife, estate, or any other designate." (JA 7). The payment of the commission was to "continue for three renewals, in the case of annual renewals, and one renewal in the case of three-year or five-year renewals, and shall be made monthly on these items paid within each respective month." (JA 7). At the end of that period "the future business shall then become the property of" (JA 7) plaintiff corporation, and there-

after the commission on that business was to be payable "annually to the associate who has serviced the particular account as per the aforegoing agreement." (JA 7). Additionally, plaintiff company was required to "carry a life insurance policy on each associate in the amount of $5,000.00, which premiums will be paid for out of its regular company income." (JA 7). "The proceeds of the policy shall be paid immediately to the wife, the estate, or the other designate, less any legitimate indebtedness to the company" (JA 7, 8) which might exist upon the death of the associate. The company had the right to carry additional insurance at its discretion "to compensate the company for loss of new production and other expenses incidental to the death of an associate." (JA 8). Furthermore, the Agreement required that in case of the death of the associate

> ". . . [t]he stock of the company which has been held by the deceased associate, shall be returned to the company. Payment for the same shall be made on the basis of the book value of the stock at the time of the death of the associate . . . Payment for this stock transaction is to be made by the company over a three-year period, minimum payment to be at least one-third annually." (JA 8).

The next provision is the one which caused the case at bar to be filed for specific performance, because the Agreement, which defendant refused to perform, after requiring "that the business of each living associate is legally his own business" (JA 8) next provided that:

> ". . . Should the associate leave the organization, he shall forfeit his stock interest to the company, receiving payment for the same at par value for each share, less any legitimate indebtedness the associate may have with the company." (JA 8).

Moreover, following the foregoing provision is the requirement:

> ". . . In the event of a prolonged illness of an associate, his business shall be carried on by the

> company and the component associates, with full commission on new and renewal business paid to the associate." (JA 8).

It may thus be seen that the company, plaintiff corporation appellee, was required to do and perform various acts in connection with the Agreement of its associates, was required to make certain payments, and in turn was entitled to receive certain benefits.

Thereafter, the Board of Directors of plaintiff corporation "approved and ratified a special agreement between associates of the McLaughlin Company, dated November 16, 1955, such Agreement outlining the procedures to be followed in the event an associate dies or terminates his association with the McLaughlin Company." (JA 11).

Obviously the Agreement was not drawn by a lawyer (JA 12) but was drawn by the people themselves.

Defendant acquired 110 shares of stock of the plaintiff corporation of the par value of $10.00 a share, some of which was given to him as a bonus but some of which, and perhaps the larger part, he purchased on terms at the price of $25.00 per share. (JA 13).

When defendant decided to go in business for himself, he resigned. Although the original effective date of his resignation was March 31, 1962, after an unfortunate clash of tempers, he left plaintiff corporation on an earlier date during March of that year. (JA 13, 14).

Although tender of $1,100.00 was made to defendant by plaintiff, defendant refused to perform the Agreement, and a suit was brought to compel defendant to convey to the corporation his 110 shares of stock at the price of $10.00 per share, in accordance with the contract. Despite the fact that the original date of effectiveness of resignation, March 31, 1962, was accepted and made effective at a somewhat earlier date, the termination of the relationship "was in essence and in spirit a resignation. All that the other associates did was to move up the

date on which the resignation was to take effect." (JA 14).

In the association between plaintiff company and its associates, each associate controlled his own business. (JA 14). When an associate left the business he would take his clients or customers with him; they did not remain with the company. (JA 14, 15).

When defendant left plaintiff company, he was in a position to take away with him a considerable amount of the business from the company. In addition, he was in a position to compete with the company both in respect of old customers and potential new customers. Those customers included persons whom he customarily serviced, and also customers of other associates or of plaintiff company itself, whom defendant may have met while he was associated with plaintiff company. It would be inequitable to permit defendant under these circumstances to continue to hold a stock interest in plaintiff company because the bulk of the income of each associate came from commissions and not from dividends on stock. (JA 15). The principal purpose of stock ownership was to control plaintiff company and it would be inequitable to permit defendant to participate in the control of plaintiff company after he left it to compete with it. (JA 15).

The stock of plaintiff company could not be purchased on the open market. Damages therefor would not be an adequate remedy for the breach of defendant's contract. Plaintiff therefore is entitled to specific performance because equitable relief is the only remedy open to it. (JA 15).

When defendant left plaintiff company, the major portion of records or copies of insurance business which defendant serviced or controlled, were turned over to him. (JA 15). There may have been a bona fide dispute as to other records. (JA 15). Plaintiff, as a condition for the grant of equitable relief, was ordered to turn over to defendant "any records or copies thereof concerning and relating to business controlled by the defendant." (JA 16).

The original Agreement was extended from time to time by the associates. (JA 9, 10).

In case defendant in good faith desires any record or copies concerning or relating to subsisting policies of insurance, the sale of which to customers is controlled by defendant, he may make such a request. If he cannot obtain them, the Court has retained jurisdiction of the cause for that purpose, an equitable burden imposed as a condition for the decree of specific performance (JA 17).

No showing was made in the Court below or is made here that defendant has not received all documents relating to subsisting policies of insurance, the sale of which was controlled by defendant; nor that plaintiff has failed to exercise good faith in delivery of multitudinous records.

SUMMARY OF ARGUMENT

1. A rule which may once have required mutuality of remedy to permit specific performance has been so qualified by exceptions that it has ceased to be a rule of law today.

2. Even though plaintiff corporation did not actually sign the Agreement in suit, its associates, officers, and stockholders on its behalf did so, and plaintiff corporation approved and ratified it. Thus, the Agreement could have been enforced against plaintiff corporation and is specifically enforceable by plaintiff corporation.

3. The Trial Court interpreted the Agreement in the light of the evidence produced at the trial. What the parties intended by their contract was a factual question to be resolved by the Trial Judge.

4. Plaintiff corporation was a third party beneficiary and consideration amply flowed between the parties. The "associates" achieved security and benefits, while the corporation secured protection and the loyalty and effort of its associates.

5. Defendant appellant did in fact "leave the organization" of plaintiff corporation whether he be considered an employee or a corporate officer. No "forfeiture" was involved since the Agreement of the parties provided for a sale, not a "forfeiture."

ARGUMENT

I.

> "If there ever was a rule that mutuality of remedy existing, not merely at the time of the decree, but at the time of the formation of the contract, is a condition of equitable relief, it has been so qualified by exceptions that, viewed as a precept of general validity, it has ceased to be a rule today . . . (citing cases) . . . What equity exacts today as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant." *Epstein v. Gluckin,* 233 N.Y. 490, 493, 494, 135 N.E. 861 (1922).

Indeed, in the District of Columbia, *Bride v. Reeves,* 36 App. D.C. 476 (1911), where the contract contained no promise on the part of the purchaser to pay the price, the Court granted specific performance when the purchaser instituted an action and offered the price, the Court holding that "the mutuality of remedy was complete" by the tender of the price made in the Complaint. The Court further said at page 482:

> " . . . [P]laintiff would seem to be in a position analogous to one holding an option, who, after notice of his election, and demand for performance, brings his suit."

Additionally the Court said on the same page just cited:

> " . . . When the plaintiff offered performance, and filed his bill, the mutuality of remedy was complete. He then, at least, brought himself under the obligation of the contract, and came completely under the power of the court."

In *Shell Eastern Petroleum Products v. White*, 62 App. D.C. 332, 68 F.2d 379 (1933), even though the corporate defendant, which appealed, did not sign the contract, this Court decreed specific performance on the ground that ample evidence of adoption of the contract and authority for its execution existed *aliunde* the contract itself. Further, the wife of the individual owner of the property had not signed the memorandum, but joined the individual owner in bringing a suit for specific performance. When this Court affirmed, it held, 62 App. D.C. 337:

> ". . . [W]here both owners of the land join in a suit for specific performance, both thereby bring themselves within the obligation of the contract and completely under the power of the court."

In ***Robb v. Crawford***, 56 App.D.C. 394, 16 F.2d 339 (1926), the Court distinguished *Crowley v. Crowley*, 56 App.D.C. 340, 13 F.2d 311 (1926), (relied upon by appellant defendant here) and in effect on the specific performance phase of the case, overrules it, if it needed to be overruled, on the ground that a two-year delay made conditions so changed as to make specific performance of the contract inequitable.

Further, in ***Robb v. Crawford, supra***, the Court held as follows, 56 App.D.C. 397:

> "But, even if it be assumed that there was a lack of mutuality when the contract was executed, this element was supplied on the part of the plaintiff during the life of the contract and prior to the filing of the suit. 'The better opinion is that it is not essential that the mutuality of remedy shall exist at the inception of the contract, and that, where the contract was originally lacking in mutuality, this element may be supplied by voluntary performance on the part of the party seeking specific performance. (Citing cases)' "

Further, in ***Robb v. Crawford, supra***, the Court in quoting from *Willard v. Tayloe*, 8 Wall. (75 U.S.) 557, 567, 19 L.ed 501 (1870), dis-

cusses the remedy of specific performance in a manner which is particularly apt in the case at bar:

> "'In general, it may be said that the specific relief will be granted when it is apparent, from a view of all of the circumstances of a particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for, if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result. If that result can be thus obviated, a specific performance will generally in such cases be decreed conditionally.'" (56 App.D.C. 396)

The foregoing quotation could not be more apt than in the case at bar, where to permit defendant appellant to continue to own stock in plaintiff corporation would be to place plaintiff corporation and its individual associates at an enormous disadvantage when defendant competes with plaintiff in attempting to sell insurance to customers in the District of Columbia and its environs; and when defendant appellant would seek to exercise some voice in the operation of plaintiff corporation, his competitor for the sale of insurance to customers in the District of Columbia and its environs.

The case at bar comes down to a simple consideration of whether or not defendant should be permitted to hold his shares of stock under all of the circumstances of the case. To permit defendant appellant to continue to own stock in plaintiff corporation would be the height of injustice. See also discussion, *infra*, parts III and IV.

II.

In order to obtain specific performance of a contract to which a corporation is a party, the corporation need not be shown to have executed the contract document itself. *Fletcher* CYCLOPEDIA OF CORPORATIONS Vol. 7, Sec. 3016, p.87, where the text writer says:

> "Thus, an agreement purporting to be only the individual undertaking of certain stockholders, and signed only by them, may bind the corporation, where it was in fact executed for and in behalf of the corporation which received the benefits thereof."

Recourse to the cases indicates the foregoing citation to be apt in the case at bar.

MacDonald, et al. v. Winfield Corp., et al., 82 F.Supp. 929 (D.C. E.D.Pa. 1948), is a case in which only the corporation could perform the agreement and it was held bound thereby even though it had not executed the documents. The Court says, 82 F.Supp. 930:

> "'A contract by a corporate officer or agent need not, however, be made and signed in the name of the corporation to render the corporation liable thereon, if it was the intention of the parties to bind the corporation.'" (Citing 13 AM. JUR., *Corporations*, Sec. 1107)

In the case at bar, as has been shown in the Statement of Fact, it could only have been intended that the corporation be bound by the contract since it was a party necessary to perform it; substantially all of its stockholders signed it. Also, all of its officers executed the contract. (JA 10, 11)

Further, in *MacDonald, et al. v. Winfield Corp., et al., supra*, 82 F.Supp. 930, the Court says:

> "The contract nowhere says in so many words who the parties to it are . . ."

> ". . . there are a number of . . . (promises) . . . which are undertaken by 'the undersigned' but which would have to be performed by the corporation **and could not be performed by anyone else.**" (Insertion and emphasis supplied)

A like principle is cited in *Jones v. Williams*, 39 S.W. 486, 489 (Sup.Ct.Mo. 1897) where a corporation was held liable on a contract which it had not executed because it was obviously the intention of its principal stockholder to bind it; only performance by the corporation could render the agreement effectual.

American Preservers' Trust v. Taylor Manufacturing Co., et al., 46 Fed. 152, 153 (C.C.E.D. Mo. 1891) where indeed the corporation did not execute the agreement; the stockholders did, and the corporation was held to have been properly made a party, although the contract was denied enforcement on other grounds.

See also, *Shell Eastern Petroleum Products v. White, supra,* where as heretofore stated, the corporation did not sign the Memorandum of Agreement but specific performance was decreed anyway, because the corporation was proved by independent evidence to have approved the contract.

In the case at bar it has been shown that only plaintiff appellee corporation could make payments of compensation to the widows or beneficiaries of deceased "associates"; only plaintiff appellee corporation could see that payments be continued for three renewals by the corporation and monthly on items paid monthly; only plaintiff appellee corporation could obtain the property or business of deceased "associates," and thereafter make payment of commissions "to the associate who had serviced the particular account as per the aforegoing agreement"; only plaintiff appellee corporation could carry life insurance on the life of each "associate" and pay the "proceeds of the

policy" to the beneficiary of the "associate"; only plaintiff appellee corporation could accept return of the stock of the "associate," making payment therefor "on the basis of the book value of the stock at the time of the death of the associate;" only plaintiff appellee corporation is the party to whom the associate "shall forfeit his stock interest **to the company**" if an associate shall leave the organization; only plaintiff appellee corporation could make payment for the stock which was to be returned to the company after death, or after resignation, or after request by a "vote of a majority stock ownership"; only plaintiff appellee corporation could carry on the business of an "associate" "with full commission on new and renewal business paid to the associate" after an illness. And indeed, plaintiff appellee corporation by a vote at a meeting of its Board of Directors "approved and ratified" the agreement.

There are really two legal theories involved here: One is that the parties intended to bind the corporation when the agreement in suit was signed; the other is that the corporation specifically adopted, ratified and approved the agreement by a meeting of its Board of Directors (JA 11).

Hence, in the light of the foregoing, it is clear that the corporation was intended to be a party bound by the contract; plaintiff appellee corporation specifically approved and ratified it; plaintiff appellee corporation could be held liable thereon and is entitled to specific enforcement thereof, where the Court may specifically enforce the contract without injustice or hardship. This the Trial Court has done.

Full protection to the right of defendant appellant, if any, to his own "business" was reserved by the Trial Court in respect of any policies of insurance "the sale of which to customers are controlled by defendant" and full jurisdiction was retained to see that defendant received all records or copies thereof relating thereto (JA 17). The final decree could not possibly have been more carefully drawn to

make certain that no injustice or hardship was created in connection with enforcement of the decree. On the other hand, denial of specific enforcement would have been a severe matter of oppression, injustice and hardship to plaintiff appellee, as has been shown.

III.

It is encumbent upon defendant appellant to show that the interpretation of the contract by the Trial Court was erroneous in the light of the circumstances of the case. What the parties intended "by their contract . . . was a factual question to be resolved by the Trial Judge . . ." *Davis, et al. v. Humphreys & Harding, Inc.*, __ A.2d __ (No.3525 D.C.App. decided December 2, 1964). See also *Backus v. Veterans Cooperative Housing Association*, 96 A.2d 513, 515 (D.C.Mun.App. 1953).

Defendant appellant has seen fit not to order a transcript of the testimony taken at the trial and a transcript of that testimony is, therefore, not available. Defendant appellant in this Court, in a document entitled, "Appellant's Objection to Motion to Dismiss Appeal or for Alternative Relief," stated as follows: (Page 2)

> "The lower Court made extensive findings of fact in the 'Oral Opinion of the Court,' which is part of the record herein, and Appellant relies on these facts and they are sufficient for the disposition of the points Appellant raises on appeal. The lower Court made a finding as to how Appellant left the organization and as to whether or not Appellant had received his business.
>
> "As there are no errors assigned for any of the lower Court's rulings regarding the admissibility of testimony or exhibits, a transcript of the testimony adduced at the trial below could serve no useful purpose in determining whether or not

> the trial Court correctly applied the law. Therefore, a transcript of the testimony would serve no useful purpose for either of the parties hereto and is unnecessary for this appeal."

This was in response to an application by appellee plaintiff to require appellant defendant to order a transcript of the testimony.

Appellee plaintiff then again moved to strike the Statement of Points of Appellant or for Alternative Relief, including therein a specific demand on page 5 to require appellant defendant at his expense to have prepared a transcript of the testimony in the Court below. To this appellant defendant replied in a document entitled "Appellant's Objection to Motion to Strike Points or for Alternative Relief," part 2, commencing on page 1 thereof stating:

> "Appellant has already stated that in his opinion the findings of fact contained in the oral opinion of the Court are sufficient for the disposition of all points raised on appeal. Appellant will rely solely on the facts contained in said oral opinion and does not believe that it would serve any useful purpose to transcribe the testimony below and file it in this Court."

As has been shown, what the parties intended by their contract was a factual question to be resolved by the Trial Judge. The Trial Judge in the case at bar has resolved it as a question of fact. The Trial Judge found as a fact:

> "The clear intent of the provision is that the associate leaving the organization should reconvey his stock interest to the company at the price of par value for each share, and the Court so construes that provision." (JA 12).

Obviously, the foregoing interpretation of the Trial Judge, based on all of the evidence, cannot be reviewed here as a factual question unless the evidence is presented. In any event, a mere reading of the

contract as analyzed in this Brief, indicates that what the parties intended, the Trial Court required them to do. Nothing could be clearer than the intention of the parties that if an associate left plaintiff appellee corporation, as defendant appellant did, that the associate so leaving should return his stock to the corporation and have the corporation pay par value for it. It is nonsensical to assume that the parties meant anything else, and it is equally absurd to claim that there is a vagueness or ambiguity in the contract in this regard. Whatever rights defendant may have to records of policies of insurance, the sale of which he controls, have been amply reserved by the Trial Judge; a tender of the price has been made; nothing else remains to be done except for defendant appellant to perform the decree. It is to be borne in mind that defendant appellant by his counsel, observed that the decree of the Trial Court was "very just and equitable," (JA 16) although in this Court there would seem now to be some question about it in the mind of defendant appellant.

As a matter of fact, the Trial Court found below: (JA 14, 15)

> "The circumstances of this contract are such that each associate controls his own business. When the associate leaves the business, he takes his clients or customers with him; they do not remain with the company. Consequently, the defendant would be in a position to take away with him or was in a position to take away with him a considerable amount of business from the company and, in addition, to compete with the company both in respect to the old customers and potential new customers. It would be inequitable to permit the defendant (Appellant) under these circumstances to continue a stock interest in the company, which was, after all, a nominal matter as compared with the entire business, because the bulk of the income of the associates came from commissions and not from dividends on the stock. It is quite apparent that the principal purpose of the stock

was to control the company, and it would be inequitable to permit the defendant to participate in the control of the company after he has left it." (Insertion supplied)

To challenge the foregoing finding of fact without the evidence upon which it was based, is a burden which appellant defendant has voluntarily and knowingly assumed. See *Barker v. Albright*, 66 App. D.C. 296, 86 F.2d 852 (1936). In these circumstances, where there is no showing that the evidence upon which the decree was based was insufficient to support it, this Court should affirm the decision below on the opinion of the Trial Court.

IV.

Clearly plaintiff appellee corporation was a third party intended by the associates to benefit from the Agreement. *Marranzano v. Riggs Nat. Bank*, 87 U.S. App. D.C. 195, 184 F.2d 349 (1950); *Aetna Ins. Co. v. Eisenberg*, (C.C.A. 8th 1961) 294 F.2d 301, 305, 306; *Campbell Soup Co. v. Diehm*, (D.C., E.D. Pa. 1952) 111 F.Supp. 211, 214; *Hamil v. Maryland Cas. Co.*, (C.C.A. 10th 1954) 209 F.2d 338, 340, 341; *Mutual Ben. Life Ins. Co. v. Ellis, et al.*, (C.C.A.2d 1942) 125 F.2d 127, 130, 131; *Union Oil Co. v. Hunt*, (C.C.A. 9th 1940) 111 F.2d 269, 276; *United States ex rel Hargis v. Md. Cas. Co.*, (D.C. S.D. Cent. Div. 1946) 64 F.Supp. 522, 527; 12 AM. JUR., *Contracts*, Sec. 277, p.825, 826; *Anno.* 81 A.L.R. 1271 et seq. See also, *Anno.* 77 A.L.R.24, 118 A.L.R. 57, 60. The corporation performed it; the benefits flowing to the associates as people associated with plaintiff company in business were ample; the associates, including defendant, obtained the benefits of security in case of illness, death, resignation, or enforced resignation; and their families after their death or in case of illness, were provided for. Nothing would be more inequitable than to hold that the consideration which the parties themselves created in the solicitation of general insurance did not constitute a consideration.

Obviously the consideration flowing between the parties, and the benefits they derived from the corporate undertakings which were specifically "approved and ratified" by the corporation (JA 11), were ample.

It is difficult to see how defendant could claim that plaintiff had only an "incidental interest" in the contract. The management of its business affairs in competition with any associate who resigned should certainly not be left, even in part, to the vote of the competitor, a former associate. Plaintiff additionally earned general agent's commissions on all sales effected by its "associates" and thus was seeking by the Agreement to stimulate their loyalty and their effort. The intention of the parties was to confer rights upon the plaintiff appellee as well as themselves. Therefore, plaintiff appellee corporation **was** a third party beneficiary, intended to be benefited, with duties to perform, which it performed, and it may enforce the contract as such.

V.

Defendant appellant resigned from his association with plaintiff appellee corporation. The Trial Court found as a fact that "actually the termination of the relationship was in essence and in spirit a resignation. All that the other associates did was to move up the date on which the resignation was to take effect." (JA 14). That finding of fact by the Trial Court is not in any manner challenged. It must be taken then that defendant appellant argues that by moving up the date on which the resignation was to take effect, defendant appellant was requested to resign within the meaning of another provision of the Agreement. This is clearly not a fact, nor an appropriate legal construction of the events which occurred.

The relationship which existed between the parties was either that of master and servant (defendant appellant was employed by plaintiff appellee) or a relationship of officer to corporation (defendant appellant was an officer of plaintiff appellee corporation). If the

former relationship was in effect, namely, that of master and servant, then when defendant gave a notice of termination of his employment, stating that he would "leave" after the expiration of thirty (30) days, the relationship of master and servant was lawfully terminated. The sole obligation of the employer was only to make payment for services performed for the thirty (30) day period of notice given by the employee. *Lyon v. Pollard*, 20 Wall. 403, 22 L.ed 361 (1874), a case which went to the Supreme Court of the United States from the District of Columbia, held that the sole liability of the employer was to pay the employee for the full notice period. See also *Anno.* 35 A.L.R. 896.

In *Parkway Motor Co., Inc. v. Charles*, 59 App. D.C. 247, 39 F.2d 292 (1930), this Court specifically enforced a termination provision of a contract as a matter of law holding that

> ". . . since the contract was terminated by the voluntary act of the defendant, he is in no position to complain . . ." (59 App.D.C. 248).

Cases involving a bonus payable to an employee, the bonus to be lost when he voluntarily terminates his employment, are somewhat analogous to the principle here involved. Almost on all fours is the case of *Schotter v. Carnagie Steel Co.*, 272 Pa. 437, 116 Atl. 358 (1922) where an employee, with an offer of another employment, consulted his employer concerning it. After some discussion, the employee decided to take the other position and did so. Thereafter, he complained that he did not "voluntarily quit" the employment and that he should, therefore, not lose his bonus stock. The Court held that he should do so. The employee claimed that he had obtained other employment by "mutual consent" of himself and his first employer; that he had not "quit." The Court discussing the problem held that he had simply considered whether or not he should "quit" and after discussing it, had done so. Exactly the same thing happened in the case at bar. Defendant, in the case at bar, submitted his resignation;

and after further discussion with his employer, voluntarily handed in his keys. This he did with full knowledge of what he was doing, and in effect, by action, as well as words, agreed to leave *eo instanti*, rather than at a later date. No case could be clearer than *Schotter, supra.* Although defendant appellant in the case at bar stated in effect, at first, that he intended to "leave" on the 31st day of March, he later decided, after some discussion and, perhaps, bitterness, that he would "leave" at once. This he did. The Agreement of the parties, therefore, immediately came into play.

If the second relationship mentioned above, that of an officer to corporation existed, then it is perfectly clear, as a matter of law, that a resignation of a corporate officer takes effect immediately, whether oral or written, and without action by the corporation itself.

Fletcher, CYCLOPEDIA OF CORPORATIONS, Vol. 2, Sec. 349, p. 144; *Briggs v. Spaulding*, 141 U.S. 132, 154, 35 L.ed 662, 671 (1891); *Wingate v. Bercut et al.*, 146 F.2d 725 (C.C.A. 9th 1944); *International Bank of St. Louis v. Faber*, 86 Fed. 443 (C.C.A.2d 1898); *Fearing v. Glenn*, 73 Fed. 116 (C.C.A.2d 1896); *Movius, etc. v. Lee, et al.*, 30 Fed. 298 (C.C. N.D. N.Y. 1887).

As a corporate officer then, defendant simply by acts of leaving, stronger than words, decided to leave at once, and did so. There is no other possible interpretation of what he did. For defendant appellant now to argue that his resignation was requested, after he himself resigned, and the Trial Court so found, is frivolous.

It is to be noted that no "forfeiture" is involved. Defendant appellant "forfeited" nothing, and plaintiff appellee corporation received nothing by way of "forfeit." Plaintiff appellee corporation had to pay for the stock then owned by defendant appellant, albeit at a lower rate or for a lesser sum than would have been the case had defendant not resigned. Hence, no "forfeiture" is involved. Only a sale of stock is involved and that sale, by Agreement, was to be made at one price if

defendant voluntarily resigned, and at another price in case defendant was asked to do so, in effect discharged against his will. The Trial Court so found (JA 12):

> "The word 'forfeit' is not a felicitous choice of words because obviously no forfeiture is provided for."

As has been shown, defendant appellant in the case at bar simply left plaintiff appellee corporation for the purpose of competing with it in the sale of general insurance to customers in the District of Columbia and its environs.

CONCLUSION

In the light of all of the findings of the Trial Court, it becomes clear that the judgment from which an appeal has been taken was "very just and equitable." The agreement between the parties is clear; its adoption by plaintiff appellee corporation is clear; the obligations of defendant appellant are clear, namely, that he must transfer his shares of stock at a price equal to par value thereof, even though he received some of them without cost to himself. Full right was reserved to defendant appellant by the Trial Court to obtain any record to which he was lawfully entitled under the terms of the agreement or by general law. Hence, the decision of the Trial Court should be affirmed.

Respectfully submitted,

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